Supreme Court, U.S.
FILED
APR 28 1997
CLERK

No. 96-1553

In the Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP,

Petitioner,

vs.

P. LaRUE SIMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Janet G. Abaray
Counsel of Record
Stanley M. Chesley
WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.
1513 Central Trust Tower
Cincinnati, OH 45202
(513) 621-0267

Counsel for Respondent P. LaRue Simpson

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QUESTIONS PRESENTED

SHOULD CERTIORARI BE GRANTED WHEN THE SOLE LEGAL ISSUE IN THE "QUESTION PRESENTED" HAS ALREADY BEEN RESOLVED BY THE APPELLATE COURT IN PETITIONER'S FAVOR, AND THE ONLY REMAINING DISPUTE CONCERNS THE EVALUATION OF STIPULATED FACTS?

SHOULD CERTIORARI BE GRANTED WHEN EACH CIRCUIT COURT OF APPEALS AGREES, CONSISTENT WITH UNITED STATES SUPREME COURT PRECEDENT, THAT THE DETERMINATION OF PARTNER VERSUS EMPLOYEE STATUS UNDER THE ADEA AND ERISA MUST BE BASED UPON A REVIEW OF ALL RELEVANT FACTS CONCERNING COMMON LAW ATTRIBUTES OF PARTNERSHIP?

SHOULD CERTIORARI BE GRANTED WHEN NO ISSUE OF CONSTITUTIONAL IMPORTANCE OR PUBLIC POLICY IS RAISED BY THE PETITION, AND INSTEAD THE ONLY ISSUE CONCERNS THE FACTUAL DETERMINATION THAT ERNST & YOUNG INTENTIONALLY DESIGNED A BUSINESS STRUCTURE WHICH CREATED THE FACADE, BUT NOT THE REALITY, OF PARTNERSHIP STATUS, THEREBY RENDERING ERNST & YOUNG LIABLE UNDER THE ADEA AND ERISA WHEN IT IMPLEMENTED ITS SCHEME TO FIRE OLDER EMPLOYEES FALSELY LABELED AS PARTNERS?

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I. STATEMENT OF THE CASE

A. Procedural Status

In what the district court described as "one of the strongest age discrimination cases" which the court had seen or heard of in sixteen years on the bench (Record at JA 3578, Transcript 5/12/94 at 5), Plaintiff-Respondent P. LaRue Simpson prevailed in his claim not due to an "absurd result," but rather due to overwhelming evidence that Defendant-Petitioner, Ernst & Young, intentionally engaged in a systematic scheme to fire older employees falsely labeled as partners and replace them with younger workers. In holding in favor of plaintiff under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et. seq.*, Employee Retirement Income Security Act, ("ERISA"), 29 U.S.C. §1001 *et. seq.* and Ohio law, the district court, the jury, and the Court of Appeals for the Sixth Circuit each agreed that Ernst & Young's actions were done in willful violation of federal and state law; each rejected as pretext the causes for discharge asserted by Ernst & Young.

Ernst & Young requests that the United States Supreme Court grant its petition for certiorari to review the unanimous opinion of the United States Court of Appeals for the Sixth Circuit in which it affirmed in every respect the judgment of the United States District Court for the Southern District of Ohio.[1] Petitioner suggests that the Court of Appeals for the Sixth Circuit committed grave error in holding that plaintiff qualified as an employee entitled to protection under the ADEA and ERISA. Ernst & Young

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[1]Judge Daughtrey concurred separately but expressly noted that she was writing to address the legislative branch "as well", rather than to disagree on any point made by her colleagues.

made this exact argument in its petition to the Sixth Circuit Court of Appeals for rehearing en banc. Not a single judge of the Sixth Circuit Court of Appeals, however, voted in favor of en banc rehearing. Appendix E to Petition at 98a.[2] Thus Ernst & Young comes to this court to re-litigate a factual and legal argument that has been soundly rejected by no less than eight jurors, two district court judges, a unanimous three judge panel of the Sixth Circuit Court of Appeals and the entire active bench of the Sixth Circuit. Appendix A, Appendix B, Appendix C, Appendix D, Appendix E.

B. The Evaluation of Stipulated Facts Concerning Plaintiff's Employee Status.[3]

Ernst & Young came into existence on October 1, 1989 upon the merger of the firms of Arthur Young & Co. and Ernst & Whinney. Appendix A at 3a-4a. Simpson and other former partners of Arthur Young and Ernst & Whinney voted on the merger by signed ballot, with no option presented as an alternative to the merger. Appendix C at 29a-30a. Non-compete agreements with the predecessor firms continued in force and were later supplanted by new non-compete agreements. (*See, e.g.*, Record at JA 3760, Exhibit 73, internal memorandum referring to the new non-compete for Ernst & Young that "blends provisions previously utilized by Arthur Young and Ernst & Whinney";

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[2]Hereinafter all Appendix citations refer to the Appendix to the Petition for Certiorari.

[3]The parties stipulated in the district court that no genuine issue of material fact existed concerning Simpson's relationship with Ernst & Young, and agreed to submit the issue of his employee status to the court on cross-motions for summary judgment. The appellate court reviewed the issue of summary judgment *de nova*. Appendix A at 10a, n. 1.

See also, Appendix A at 12a.) Thus, even the option of leaving the firm was foreclosed as an alternative to the merger.

In describing the merger process, the Sixth Circuit observed:

> the promoters of the merger prevailed upon Simpson and other personnel similarly situated to execute documents designed to centralize all power to manage the newly-created firm and its assets through an intentionally ambiguous business structure calculated to divest Simpson and others similarly situated of all indicia of meaningful partnership participation in the new firm.

Appendix A at 5a-6a.

The Court of Appeals for the Sixth Circuit describes the "convoluted Partnership and U.S. Agreements [for Ernst & Young] which were calculated to create only an illusion that the firm's personnel were partners." (Appendix A at 11a). Indeed, the Ernst & Young operating agreement is not a partnership agreement, but rather is entitled: "Agreement of the Parties-U.S." Appendix A at 4a. Ernst & Young concedes that it carefully avoided referring to this operating agreement as a partnership agreement because the parties to the agreement included both certified public accountants [C.P.A.s] and non-C.P.A.s. Professional standards governing C.P.A.s prohibit a C.P.A. firm from including non-C.P.A.'s as co-owners. Petition at 3, n.1.

In describing this operating agreement to the parties of Ernst & Young, the Management Committee explained: "To further ensure our compliance with state accountancy

laws . . . the terms 'Party,' 'Capital Account Party,' and 'Investment Account Party' are utilized in the agreement rather than 'Partner' even though in our internal communications and for tax purposes all of us shall be referred to and treated as partners." (Record at 3760, Exhibit 73 at 1). Thus the Sixth Circuit observed: "the characterization of 'partner' was a title that carried no legal significance which could be disclaimed when convenient to the defendant's management." Appendix A at 6a.

In addition to the "Agreement of the Parties-U.S.", the parties of Ernst & Young who were C.P.A.'s were also signatory to a second agreement, entitled the Ernst & Young Partnership Agreement. Appendix C at 30a. This agreement contained no mechanism for the distribution of profit. Never did Mr. Simpson receive any compensation from this entity. Appendix C at 32a. As such, it fails to meet the definition of a partnership, which is an "association of two or more persons to carry on a business for profit." N.Y. PARTNERSHIP LAW Sec. 10 (McKinney 1988).

The Sixth Circuit noted the following facts concerning the organization of Ernst & Young:

> In sum, the firm's business, assets, and affairs were directed exclusively by a 10 to 14 member Management Committee and its chairman. The Management Committee exercised exclusive control over the admission and discharge of all personnel, including Simpson. It could terminate employees without cause and without a right to appeal such decisions. The Management Committee unilaterally determined the compensation of all personnel, which authority was exercised and executed in total secrecy. Simpson and those similarly situated had no vote for

> the chairman or the members of the Management Committee. Instead, the Management Committee appointed its chairman and its chairman appointed the members of the Management Committee.

Appendix A at 6a-7a.

Simpson lacked other aspects of managerial authority as well. He had no authority to accept new clients. Appendix C at 34a. He had no authority to transfer, hire or fire people in the Cincinnati Entrepreneurial Services Department that he directed. Appendix C at 51a. He had no authority to sign an audit on behalf of Ernst & Young without prior approval from the audit committee. Appendix C at 53a. In addition, Ernst & Young asserted a claim of attorney-client privilege against Simpson to prevent him from receiving in discovery a legal opinion concerning termination of "partners." The memorandum was prepared by general counsel of the firm and directed to the firm's Management Committee. Appendix C at 33a.

The extremely curtailed nature of the rights of the non-management committee parties was summarized by the Sixth Circuit as follows:

> Simpson had no authority to direct or participate in the admission or discharge of partners or other firm personnel; participate in determining partners or other personnel compensation predicated upon performance levels, responsibility, and years of service with the firm, including his own; participate in the vote for the chairman or the members of the Management Committee; or participate in the firm's profits and losses or share in unbilled uncollected client accounts ("UBT's"). Simpson had no right to examine the

> books and records of the firm except to the extent permitted by the Management Committee. He was required to execute a will which mandated that his heirs accept as binding the accounts provided by Ernst & Young with no right of inspection or verification. He had no authority to sign promissory notes on behalf of the firm, or pledge, transfer, or otherwise assign his interest in the firm. He was refused access to data concerning various client accounts. He was denied participation in annual performance reviews and other indicia of partnership status.

Appendix A at 6a.

While Ernst & Young contends that the agreements merely contained organizational provisions essential to manage a national partnership, this contention has been soundly rejected. As stated by the district court:

> it was not 'normal business caution' to prevent him [Simpson] from voting on substantive matters, to deny him a proportionate share of firm profits, to eliminate his share in the firm's accounts receivable, to deny him personnel authority, to prevent him from examining the firm's books, and to prevent him from learning what legal advice the firm's attorneys provided.

Appendix C at 53a.

The Sixth Circuit Court of Appeals affirmed, holding: "Simpson and his similarly situated colleagues were relegated to the position of an employee subject to the virtually

absolute, unilateral control of the Management Committee." Appendix A at 6.

Notwithstanding the unequivocal evaluation of fact affirmed by the appellate court, Ernst & Young reargues to the United States Supreme Court factual allegations concerning alleged capital contributions, voting rights, methods of compensation, and unlimited liability. Each of these arguments, however, has been previously considered and rejected by the district and appellate courts. Appendix A at 10a, n.2 and Appendix C at 53a-54a (questioning the enforceability of the liability provisions due to lack of consideration); Appendix C at 47a-48a (describing the capital contribution as a "paper transaction" for which Simpson "did not invest one cent of his own money" and finding capital contribution is a loan rather than evidence of an ownership interest in the firm because it only generates interest payments, rather than a creating an equity interest in the firm's assets); Appendix C at 48a-49a (finding that compensation paid to plaintiff, which the firm treated as a salary and deducted as a business expense for state tax purposes, and which it determined in secrecy with no apparent relationship to firm profits and no relationship to ownership interest or points, is more akin to a salary paid an employee than a distribution of profits to a partner, and rejecting significance of federal tax treatment because the IRS defines a partnership more broadly than the common-law and includes any business entity which is not an estate, trust or corporation); Appendix C at 50a (finding alleged voting rights to be "illusory" and "perfunctory"); *See generally*, Appendix A at 6a-7a. Totally unpersuaded by the exact arguments which Ernst & Young repeats in this petition for certiorari, the Sixth Circuit Court of Appeals concluded: "the arrogant and arbitrary treatment accorded Simpson and those similarly situated reflect a design by . . . the promoters of

the merger and, subsequently, the Management Committee to deny Simpson and those similarly situated with him from *bona fide* partners status." (Appendix A at 11a).

Upon reviewing all the evidence, the Sixth Circuit Court of Appeals determined: "plaintiff does not qualify as a partner for purposes of the ADEA, ERISA or Ohio Rev. Code Sec. 4101.17 (Anderson 1989). . . [T]he decision of the trial court to recognize Simpson as an employee in contradistinction to partner is AFFIRMED." Appendix A at 11a.

C. The Factual Findings Concerning Age Discrimination and ERISA Violation.

The Sixth Circuit confirmed the district court's determination that Ernst & Young management induced parties to vote in favor of the merger based upon false promises that:

> (1) there would be no major head count or staff reductions as a result of the merger, (2) the merger would result in equitable or better retirement benefits for all concerned, and (3) both predecessor firms anticipated that the merger would result in an increase in cash earnings and significant growth opportunities for all concerned.

Appendix A at 4a. Despite these assurances to the "partners", the Ernst & Young Management Committee secretly voted within days of the merger to eliminate "excess staff capacity" by 5%, and set to work in the next two months to systematically fire partners. Appendix A at 4a. In executing this planned staff reduction, the Management Committee agenda included an analysis entitled "Comparison

of Partner Ages in Fiscal 1990," under the heading of "Partner Resignations and Retirements" - "where do we stand in the process." Appendix A at 5a. Simultaneously, the Management Committee addressed "The Partner Recommendation Process" or the acceptance of new [and younger] persons as "partners." *Id.* Never in this process of firing partners did the Management Committee consider lowering the compensation paid to partners or freezing new partner admissions as an alternative to systematically discharging older partners. *Id.* A member of the Management Committee testified: "It would be dumb" to lower compensation or freeze new partner admissions rather than discharging older partners. *Id.* He testified further that it was necessary to fire Simpson and other older partners to make room for the "bright young people." *Id.* Not surprisingly, the evidence demonstrated Ernst & Young fired 120 parties age forty and over in an eighteen month period (including Simpson), while simultaneously admitting 162 new parties under age 40. *Id.* Simpson was replaced as Director of Entrepreneurial Services with a partner under age forty. *Id.*

Ernst & Young's assertion in its petition for certiorari that it discharged Simpson because he had a pre-existing home mortgage loan with a bank that subsequently became a client, and for various other business reasons (Petition at 4), has also been rejected by both the appellate and district courts. In referring to the allegation concerning the bank loan, the Sixth Circuit noted: "Both the trial court and the jury rejected this argument as pretextual and specious, especially since an Ernst & Young internal investigation had absolved Simpson of any impropriety or wrongdoing." Appendix A at 5a. As to the remaining business reasons asserted, the district court observed: "The startling inconsistencies in the testimony of the three superiors directly

involved in Simpson's discharge undoubtedly influenced the jury, as it does the Court, in finding that the legitimate reasons these witnesses proffered are not credible." Appendix D at 81a.

In fact, Ernst & Young produced no documentation that it ever considered Simpson's performance in making its termination decision. To the contrary, the only information shown to be reviewed by the Management Committee in making its decision to discharge Simpson was his age and years of service with the firm, and "his tenacity in pursuing his post merger retirement benefits." Appendix A at 5a. Based upon this evidence, the jury and the district court found, and the Court of Appeals for the Sixth Circuit affirmed, that Ernst & Young willfully violated the ADEA, ERISA and Ohio law by terminating plaintiff without cause in order to make room for younger parties and in order to avoid its pension obligations to plaintiff. (Appendix A at 12a-13a)..

II. SUMMARY OF THE ARGUMENT

Ernst & Young's petition for certiorari to the United States Supreme Court fails to raise a justiciable legal issue because the United States Court of Appeals for the Sixth Circuit agrees with the legal proposition set forth in petitioner's "Question Presented," that one who truly possesses the characteristics of a *bona fide* general partner does not qualify as an employee under the ADEA and ERISA. The Sixth Circuit Court of Appeals differs with Ernst & Young only as to evaluation of the stipulated facts concerning whether Simpson possessed the common-law attributes of partnership. Thus, in order to address the "Question Presented" in Ernst & Young's certiorari petition, the United States Supreme Court would be required to review

the stipulated evidence and reach contrary assessments than those affirmed by the United States Court of Appeals for the Sixth Circuit. Because the United States Supreme Court is not the appropriate forum to review the evidence, Ernst & Young's petition for certiorari should be denied. Further, the evidence strongly supports the consistent conclusions of the appellate and district courts.

In addition, the Sixth Circuit properly considered and followed legal precedent established by the Supreme Court of the United States to determine the issue of employee status under the ADEA and ERISA, and adopted an approach which is entirely consistent with that of every other circuit that has considered the issue. Indeed, the Sixth Circuit Court of Appeals reached the same holding as the United States Courts of Appeals for the Tenth, Eleventh, Eighth, and Ninth Circuits, as well as the District Court for the Southern District of New York, that all common-law indicia of partnership must be examined to determine if an individual labeled as a partner qualifies as an employee under the ADEA and ERISA. Ernst & Young's petition for certiorari raises no conflict among the circuits, no important public policy issue, and no issue of constitutional importance. The petition, therefore, should be denied.

III. THE PETITION FOR CERTIORARI SHOULD BE DENIED.

A. The Petition of Ernst & Young Raises Issues Which are Strictly Factual.

The "Question Presented" by Ernst & Young's certiorari petition raises no legal issue at all. Ernst & Young's exact issue is: "Whether a partner in a *bona fide* general partnership duly created under state partnership law,

who enjoys all of the rights of other partners under the partnership agreement, may sue as an 'employee' under ADEA and ERISA?" The Sixth Circuit Court of Appeals has already answered that issue, holding: "*bona fide* independent contractors and partners are employers, not employees; and as employers, neither come within the entitlement protection or coverage of either the ADEA or ERISA." Appendix A at 9a. Because the only legal issue presented by Ernst & Young has already been determined in its favor by the appellate court, no controversy of law exists for the Supreme Court of the United States to review. *See*, Supreme Court Rule 14(a). ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.") General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 177, 58 S. Ct. 849, 82 L.Ed. 1273 (1938). ("Our consideration of the case will be limited to the questions specifically brought forward by the petition.")

The only point on which the Sixth Circuit Court of Appeals disagrees with Ernst & Young is the factual assumption made by Ernst & Young in its "Question Presented" that Mr. Simpson possessed the powers and attributes of a *bona fide* general partner. As to that issue, the Sixth Circuit robustly rejects Ernst & Young's argument. Ernst & Young's request for certiorari review, therefore, must be denied because the issue presented is based upon a false factual premise that contradicts the evaluations of both the district and appellate courts. As this Court has long held: "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." General Talking Pictures, 304 U.S. at 178. *See also*, Supreme Court Rule 10. As stated by this Court in NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503, 71 S. Ct. 453, 95 L. Ed 4799 (1951): "This is not the place to review

a conflict of evidence. . ." Further, all of Ernst & Young's arguments concerning partnership status, including its characterization of the stipulated facts regarding method of compensation, alleged capital contributions, voting rights and other issues, have been painstakingly reviewed and rejected by both the district and appellate courts. There is substantial evidence to support the consistent determinations of the reviewing courts. The conclusions of the district and appellate courts, based upon their review of the stipulated evidence, should not be distributed. General Talking Pictures, 304 U.S. at 178. Because no legal issue is raised by Ernst & Young's "Question Presented," and because the factual issues alleged have been thoroughly and properly considered by the district and appellate courts, certiorari review is inappropriate.

B. The Sixth Circuit Properly Interpreted the Statutory Provisions of the ADEA and ERISA and Correctly Followed Controlling United States Supreme Court Precedent.

The ADEA and ERISA provide protection against discrimination and interference with pension benefits for persons defined as an "employee." The only definition provided by statute of the term employee is "an individual employed by an employer." 29 U.S.C. §630(f); 29 U.S.C. §1002(6). In Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229 (1984), the United States Supreme Court held that partnerships are "employers" bound by the same laws prohibiting discrimination against employees as any other business entities.

While the United States Supreme Court recognizes "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment

relationship," Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 32, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961), courts faced with the issue have traditionally held that a person properly classified as a partner, or co-owner, is excluded from the definition of employee and thus not entitled to the protections of the various anti-discrimination acts. Appendix A at 9a. This analysis, that a person who demonstrates the common-law attributes of a partner is excluded from the definition of the word employee, has its origin at least in part in the concurring opinion by Justice Powell in Hishon, where he stated: "the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners." *Id.* at 79, 104 S.Ct. at 2236. Justice Powell added, however, in an oft-quoted footnote: "Of course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" *Id.* at 79, n.2, 104 S.Ct. at 2236.

In Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 112 S.Ct. 1344 (1992), the United States Supreme Court determined that a person classified as an independent contractor would be excluded from the definition of "employee" under ERISA. The Court held: "we adopt a common-law test for determining who qualifies as an 'employee' under ERISA." *Id.* 112 S. Ct. at 1348. The Supreme Court identified at least a dozen factors to distinguish independent contractors from employees, in a non-exhaustive list which it derived from consideration of prior precedent regarding independent contractors, administrative rulings and a comparison to the Restatement (Second) of Agency. *Id.* In discussing the analysis of the evidence pursuant to these factors, the United States Supreme Court held: "Since the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer,... all of the incidents of the relationship

must be assessed and weighed with no one factor being decisive.'" Darden, 112 S.Ct. at 1349, quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258, 88 S.Ct. 988, 991 (1968).

In affirming the judgment against Ernst & Young, the United States Court of Appeals for the Sixth Circuit carefully considered and followed these statutory provisions of the ADEA and ERISA as well as the legal precedent established by the United States Supreme Court. The Sixth Circuit agreed with Ernst & Young's contention that a person actually possessing the common-law characteristics of a *bona fide* general partner would be excluded from the definition of an employee under the ADEA and ERISA. Appendix A at 9a. *Accord*, Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977). The Sixth Circuit applied: "an analog of the Supreme Court's pronouncements in Darden to the record in this case" to establish a detailed, non-exhaustive list of common-law factors for determining partner versus employee status under the ADEA and ERISA. Appendix A at 9a. The Sixth Circuit relied upon the Uniform Partnership Act and prior legal precedent as its source for identifying various common-law attributes of partnership, just as the Supreme Court referenced prior legal precedent and the Restatement of Agency to identify common-law characteristics of independent contractors in Darden. In enumerating approximately a dozen illustrative factors to consider regarding the common-law attributes of partnership, the Sixth Circuit emulated the Supreme Court's construction of a similar list of common-law attributes of an independent contractor in Darden. The Sixth Circuit Court of Appeals did not attempt to artificially attribute weight or priority to any specific factor, again consistent with the holding of the Supreme Court in Darden that there is no magic, shorthand answer to the inquiry.

The Sixth Circuit Court of Appeals, therefore, did not depart from the usual and established course of judicial proceedings in upholding the judgment against Ernst & Young, (*Cf.* Sup. Ct. Rule 10(a)), nor did the Sixth Circuit decide an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court (*Cf.* Sup. Ct. Rule 10(c)). Instead, the Court of Appeals for the Sixth Circuit has conscientiously followed federal statutory law and the precedent established by the United States Supreme Court to distinguish partners from employees under the ADEA and ERISA.

C. The United States Circuit Courts of Appeals Agree That the Common-law Indicia of Partnership Must Be Examined to Determine if a "Partner" is an Employee for Purposes of the ADEA and ERISA.

The United States Courts of Appeals for the Eighth Circuit, Ninth Circuit, Tenth Circuit and Eleventh Circuit have each considered the identical issue raised in this petition for rehearing, and in each instance have reached the same legal conclusion as that of the unanimous Panel of this Court of Appeals for the Sixth Circuit: that determination of employee status under the ADEA or related statutes for an individual labeled as a partner must be done on a case by case basis upon review of the common-law attributes of partnership. In the most recent appellate opinion, Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996), the Court of Appeals for the Eighth Circuit considered whether shareholders in a professional corporation were the functional equivalents of partners and therefore excluded from coverage under Title VII. The court held:

> The better reasoned cases hold that the substance of the employment relationship determines whether an individual is an employee under Title VII. . . . The actual duties and role of the individual govern the resolution of the issue. An employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship. [citations omitted].
>
> In deciding whether the shareholder-directors are employees or employers, we look to the extent to which they manage and own the business. . . . All relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee. . . A factor important to consider in evaluating the degree of management and control is the ability to participate in setting firm policy. Participation rights need not be equal, but the test is whether the shareholder-directors have a meaningful voice in decision-making. . . Indicia of ownership include such things as contributions to firm capital, liability for debts, and compensation based on profits.

Id. at 81.

Similarly, in Strother v. Southern California Permanente Medical Group, 79 F.3d 859, 867 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit cited with approval the district court opinion herein [Simpson v. Ernst & Young, 850 F. Supp. 648 (S.D. Ohio, 1994), *aff'd*, 100 F.3d 436 (6th Cir. 1996)] and continued to hold:

> . . . determining whether an individual is an "employee" typically requires a factual inquiry which goes beyond merely the partnership agreement and

> the "partner" label. Courts must analyze the true relationship among partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.

Id.

The Court of Appeals for the Tenth Circuit agreed in Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S. 986 (1987), that the issue of whether an individual denoted a partner was to be considered an employee for ADEA purposes required a factual inquiry of the common-law attributes of partnership. Relying on the Uniform Partnership Act, which it noted is adopted in 48 states, the court identified traditional common-law indicia of partnership, including unlimited liability, the right to share in profits and firm management subject to agreement between the partners, the right and duty to act as an agent of the other, and shared ownership. *Id.* at 267. The court conducted a detailed review of the facts, and observed that the plaintiff effectively conceded *bona fide* partnership status. Wheeler, 825 F.2d at 261. While ultimately concluding under the facts presented the plaintiff did not qualify as an employee under the ADEA and Title VII, the court held:

> There may be circumstances not fairly covered by our holding excluding *bona fide* general partners from coverage under the Acts. The bundle of partnership characteristics we have identified may be lacking in important particulars, or there may be some deception which compromises the actuality of those

> characteristics. As Justice Powell noted; "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'" Hishon, 467 U.S. at 79, n.2, 104 S.Ct. at 2236, n.2. Those and similar circumstances expose the basic status of "*bona fide* general partner" to question and examination.

Wheeler, 825 F.2d at 277.

In Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1400-1401 (11th Cir. 1991), the Eleventh Circuit Court of Appeals held, in assessing whether a member of a professional corporation qualified as a partner or an employee under the ADEA:

> We reject the exaltation of form over substance that resides in reliance on a label . . . We agree with this statement . . . :'[t]he definition of employee is not restrictive and must turn on the facts of a particular case.' [Citation Omitted].
>
> Consideration of the statutory language, the legislative history, and federal case law having reduced the issue to the single question "partner or employee", we look to the particular circumstances of the case at hand, . . . and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership. [Citations Omitted].

Id. at 1400-1401.

In addition, the Second Circuit Court of Appeals declined to grant interlocutory review of the opinion rendered by the Southern District of New York holding that a former "partner" of a Big Eight accounting firm could be considered an employee under the ADEA. *See*, Caruso v. Peat, Marwick Mitchell & Co., 779 F.Supp. 332, 333 (S.D.N.Y. 1991). The district court in Caruso identified three factors to examine in determining whether a "partner" was an employee under the ADEA: "(1) The extent of the individual's ability to control and operate his business; (2) The extent to which an individual's compensation is calculated as a percentage of business profits; and (3) The extent of the individual's employment security." Caruso v. Peat, Marwick Mitchell & Co., 664 F. Supp. 144, 149-150 (S.D.N.Y. 1987). The district court denied Peat, Marwick's motion for summary judgment on the employee issue, and the Second Circuit did not see a need to review this finding.

These holdings unquestionably demonstrate that the circuits are in agreement. The determination of whether a partner qualifies as an employee who is protected from discrimination depends upon whether the alleged partner possesses the common-law rights of partnership. Far from exhibiting a conflict, as contended by Ernst & Young, the opinions of these appellate courts demonstrate that they have carefully analyzed and deferentially relied upon the precedent from other circuits in reaching their conclusions. (*See e.g.*, citation by Sixth Circuit Court of Appeals to Eleventh Circuit opinion in Fountain, Tenth Circuit opinion in Wheeler and Southern District of New York opinion in Caruso, as authority for review of common-law indicia of partnership, Appendix A at 10a-11a; Citation by Ninth Circuit in Strother to Tenth Circuit opinion in Wheeler, Eleventh Circuit opinion in Fountain, Southern District of New York in Caruso and Southern District of Ohio opinion herein as

authority for review of common-law partnership factors Strother, 79 F. 3d at 866-67.) Indeed, only the factual underpinnings of these cases distinguish the results. Because no conflict exists among the circuits on this matter, Ernst & Young's petition for certiorari should be denied. *See*, Sup. Ct. Rule 10(a).

D. Ernst & Young Misconstrues Legal Precedent In an Attempt to Manufacture a Conflict Among the Circuits.

Faced with completely consistent opinions by the circuit courts of appeals and the federal district courts, Ernst & Young attempts to manufacture the appearance of a conflict by constructing heretofore nonexistent labels which it claims differentiate the approaches taken by the courts on the partnership issue. Ernst & Young's effort to conjure up a conflict deserves no credence. For instance, Ernst & Young describes the Eleventh Circuit as one which finds "organizational choice as dispositive" (Petition at 15-18), relying on Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), to establish this proposition. This Court, however, reversed the Eleventh Circuit's opinion in Hishon. *See*, Hishon v. King & Spalding, 467 U.S. 69 (1984). Further, Ernst & Young's assertion that the Eleventh Circuit considers "organizational choice as dispositive" based upon the reversed opinion in Hishon cannot be squared with the holding of the Eleventh Circuit nine years later in Fountain, that: "we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership." Fountain, 925 F. 2d at 1400-1401. Similarly, Ernst & Young labels the Tenth Circuit as exercising a "deferential assessment of factors." Petition at 19. Such a description hardly coincides

with the Tenth Circuit's holding in Wheeler, that the possibilities of deception or the lack of important partnership characteristics "expose the basic status of '*bona fide* general partner' to question and examination." Wheeler, 825 F.2d at 277.

Similarly, Ernst & Young misconstrues the opinion of the Second Circuit Court of Appeals in Hyland v. New Haven Radiology Associates, P.C., 794 F.2d 793 (2nd Cir. 1986), claiming it is authority for the proposition that organizational choice is dispositive. In actuality, the Second Circuit in Hyland refused to conduct any analysis that would restrict the application of the ADEA by reclassifying shareholder-members of a professional corporation as partners.[4] The court did not, however, conclude that it would refuse to analyze the facts concerning the common-law attributes of partnership to determine if a person labeled as a partner actually qualified as an employee under the ADEA. In fact, the Second Circuit denied interlocutory review of just such an opinion in Caruso, and permitted the holding that a "partner" could qualify as an employee to stand.

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[4]While it is true that the some circuits have been willing to analogize members of professional corporations to partners based upon a review of the common-law attributes of partnership, (See, e.g. the Eleventh Circuit opinion in Fountain and the Eighth Circuit opinion in Devine), and the Second Circuit has refused to conduct such an analysis, this issue is not presented to the Court by Ernst & Young's petition for certiorari because Ernst & Young was not a professional corporation. As discussed above, none of these circuits disagree on the issue before the court in this petition for certiorari, which is whether a person labeled a partner can be considered an employee if he lacks the common-law indicia of partnership.

Ernst & Young also champions Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977), as a case adopting a "deferential assessment of factors." Petition at 21. In Burke, the court never assessed any factors, but instead only determined in a motion to dismiss that in calculating the fifteen employee jurisdictional minimum, the term "employee" in Title VII excluded partners. Most courts accept this basic premise that persons properly classified as partners are not included within the protection of the Acts. Appendix A at 9a. The Seventh Circuit was not presented in Burke with the factual issue of whether a given individual with the title of partner lacks the common-law characteristics of partnership. Both the Sixth Circuit Court of Appeals and the district court expressly found Ernst & Young's reliance upon Burke misguided because the opinion did not address the issue of defining the characteristics of partner status. Appendix A at 11a, n. 3; Appendix C at 43a.

Ernst & Young also attempts to attach significance to the quantity of common-law indicia of partnership identified in each opinion, as if a court that gives more detail and specificity is in conflict with a court that makes a broader pronouncement. Ernst & Young's strain to prove this point is evident. It even claims that the Eighth Circuit was only "purporting to endorse an approach that examines 'all relevant factors'" (Petition at 22), when it held in Devine that: "All relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee." Devine, 100 F. 3d at 81. Ernst & Young also feigns confusion over factors identified by the Sixth Circuit such as employment security (which is specifically referenced in both Caruso, 664 F. Supp. at 149-150; and Wheeler, 825 F.2d at 274), the right and duty to act as agent of other partners (quoted directly from §9 of the Uniform Partnership Act in Wheeler, 825 F.2d at 267), and the fiduciary

relationship among partners (Uniform Partnership Act §43.) These factors, however, are well-supported in the common-law and consistent with those identified by other courts. Nor is the Sixth Circuit's inclusion of "the use of the term 'co-owners'" as a factor so baffling as suggested by Ernst & Young. To the contrary, the district court observed: "While labeling a person 'partner' does not make him so, the failure to term Simpson 'partner', when he had been thus denominated at Arthur Young, is an indication that he was not intended to be a partner." Appendix C at 54a. The district court apparently suffered no confusion in applying this criteria to the facts of the case.

Just as Ernst & Young's labeling of Mr. Simpson as a partner did not make him one, so too Ernst & Young's labeling of the circuits as in conflict does not a conflict make. Because the appellate courts consistently conclude that all relevant common-law aspects of partnership status must be reviewed to determine employee status under the ADEA and ERISA, Ernst & Young's petition for certiorari review should be denied.

E. The Sixth Circuit Committed No Error in its Analysis of Common-law Indicia of Partnership.

Contrary to Ernst & Young's contention, the analysis of the Sixth Circuit is not "too demanding" simply because the Sixth Circuit refused to accept as true the facade of partnership status erected by Ernst & Young. In an amazingly self-serving declaration, Ernst & Young asserts: "It should be enough, in a case such as this, for a partnership to demonstrate that (1) it is not a sham partnership . . . and that (2) the plaintiff enjoyed the rights of the other 'partners' in the firm." Petition at 25. This proposal, of course, conflicts with the holding in Darden that "all incidents of the

relationship must be assessed and weighed with no one factor being decisive." Darden, 112 S. Ct. at 1349. Not only does the law prohibit manipulation of the criteria which the court is permitted to consider, but also Ernst & Young cannot prove even these limited issues. As pertains to the sham partnership issue, the Court of Appeals found that: "the convoluted Partnership and U.S. Agreements . . . were calculated to create only an illusion that the firm's personnel were partners." Appendix A at 11a. As to Ernst & Young's assertion that Simpson enjoyed equal powers of other partners, the Sixth Circuit held that Simpson and other similarly situated parties "were relegated to the position of an employee subject to the virtually absolute, unilateral control of the Management Committee," Appendix A at 6a. Neither the law nor the facts support Ernst & Young's contention that the Sixth Circuit erred in finding Simpson to be an employee.

Thus unlike the plaintiffs in Devine and Wheeler, who failed to present evidence of their employee status, Simpson presented compelling evidence that he was not a *bona fide* general partner. (*Cf.* Devine, 100 F.3d at 82, Wheeler, 825 F.2d at 261). Simpson established by uncontroverted evidence that he had no right to participate in the management of the firm, and that sole power to manage the firm was vested in the Management Committee. Simpson had no right to vote on the members of the Management Committee, and no right to be informed of the Management Committee's decisions. The Management Committee determined the compensation of the parties in secrecy, with no relationship to any ownership interest in the firm. Simpson and his colleagues had no idea how much fellow parties were paid and no knowledge as to how the amounts were determined. He and others similarly situated were subject to termination by the Management Committee without